No. 79-1953

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

DAVID R. FREEMAN, Director of the Department of Social Services of the State of Missouri, and JOHN ZUMWALT, Director of the Division of Family Services, Department of Social Services of the State of Missouri,
Petitioners,

VS.

LOU EMMA CHAMBLY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

MICHAEL L. LYONS,
Legal Services of Eastern Missouri, Inc.
216 North Third Street
St. Charles, Missouri 63301
(314) 946-2221

RICHARD CHASE
Legal Services of Eastern Missouri, Inc.
3684 Lindell Boulevard
St. Louis, Missouri 63108
(314) 534-8810
Attorneys for Respondents

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St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

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vs.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The Brief of respondents LOU EMMA CHAMBLY, CHRIS SCHOUE, and GEORGIA ANN LOEFFEL is in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit filed on June 11, 1980, by petitioners DAVID R. FREEMAN and JOHN ZUMWALT.

OPINIONS BELOW

The opinion of the Court of Appeals and the order of the Court of Appeals awarding fees to respondents' attorneys are reproduced in Petitioners' Appendices A and B. The opinion of the District Court is reproduced in petitioners' Appendix C and is reported at 478 F. Supp. 1221 (W.D. Mo. 1979).

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

1. Whether Missouri's policy of establishing maximum standard deductions for the work-related transportation, clothing, and meal expenses of AFDC applicants and recipients violates the Social Security Act, 42 U.S.C. §602(a)(7), and the implementing regulations, 45 C.F.R. §233.20(a)(7)(i), by prohibiting the showing of actual expenses in excess of the maximum standard deductions.

2. Whether the Court should defer to the position and practice of the Department of Health, Education and Welfare (HEW) when interpreting the meaning to be given the provisions of 42 U.S.C. §602(a)(7) relating to deductions allowable for the work-related transportation, clothing and lunch expense of AFDC applicants and recipients.

3. Whether the Attorney's Fees Awards Act of 1976. 42 U.S.C. §1988, confers upon federal courts of appeals the authority to award attorneys' fees to prevailing parties for services rendered before the appellate courts.

4. Whether the Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988, authorizes the award of attorney's fees to prevailing parties who are represented by publicly funded legal aid attorneys.

5. Whether the Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988, authorizes the award of attorney's fees in a case where a state regulation is found to be inconsistent with a provision of the Social Security Act, 42 U.S.C. §602(a)(7), when a substantial constitutional claim is alleged.

STATUTES AND FEDERAL REGULATIONS INVOLVED

42 U.S.C. §602(a)(7) provides:

> [T]he State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming Aid to Families with Dependent Children or of any other individual (living in the same home as such child or relative) whose needs the State determines should be considered in determining the needs of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income . . .

45 C.F.R. §233.20(a)(7)(i) states:

> Provide that the following method will be used for disregarding earned income: The applicable amounts of earned income to be disregarded will be deducted from the gross amount of "earned income", and all work expenses, personal and non-personal, will then be deducted. Only the net amount remaining will be applied in determining need and the amount of the assistance payment.

42 U.S.C. §1988 provides:

> [I]n any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

The facts of the case are stated more fully in the opinion of the District Court, 478 F. Supp. at 1223-1224 (Petitioners' Appendix C, A7-A10).

Plaintiffs-Respondents CHAMBLY, SCHOUE and LOEFFEL and the class they represent are employed heads of needy families who are entitled to receive Aid to Families with Dependent Children (AFDC) benefits. Their AFDC benefits have been wrongfully reduced or denied because of Defendants-Petitioners' policy of establishing maximum standard deductions for the work-related transportation, clothing and meal expenses of AFDC applicants and recipients.

In their complaint, respondents alleged that petitioners' policy of not allowing deductions for work-related expenses in excess of their maximum standards violated the Social Security Act, 42 U.S.C. §602(a)(7); the implementing regulations, 45 C.F.R. §233.20(a)(7)(i); and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. Jurisdiction was based upon 28 U.S.C. §§1331 and 1343(3) and (4).

At the time of trial, Missouri allowed employed AFDC applicants and recipients a maximum deduction of $0.60 per meal for lunch, $0.15 per mile for transportation, and no deduction for clothing other than uniforms or special shoes.

All of the respondents incurred reasonable actual lunch expenses in excess of petitioners' maximum, yet they did not receive any deduction for this expense. For example, respondent CHAMBLY ate lunch each day at the least expensive eating place in the area where she worked[1] and yet incurred work-related lunch expenses of $1.80 per day or $40.10 per month.

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[1]Petitioners' policy authorized AFDC recipients to eat lunch at restaurants.

Nonetheless, respondent CHAMBLY received the maximum deduction of only $0.60 per meal, or $13.00 per month. Respondent SCHOUE had a meal expense because of her employment. She ate lunch every day at the same place and she always ate a hamburger and coke which cost her $1.50 per day. The restaurant where she ate lunch was the least expensive restaurant in the area. Nonetheless, respondent SCHOUE received the maximum deduction of only $0.60 per meal.

Respondents SCHOUE and LOEFFEL incurred work-related transportation expenses of $0.20 per mile and $0.29 per mile, respectively.[2] However, because of petitioners' policy, they received a deduction of only $0.15 per mile for transportation expenses on their AFDC budgets.

Respondent CHAMBLY incurred a monthly expense of $23.80 for clothing required by her employer's written dress code. She wore this clothing only while working. Nevertheless, respondent CHAMBLY did not receive any deduction for this expense due to petitioner's policy restricting clothing deductions to uniforms and special shoes.

Petitioners dispute the reasonableness of respondents' work-related transportation, meal and clothing expenses. While respondents contend that their expenses are reasonable, this is not an issue which needs to be judicially determined. Once it is determined that AFDC applicants and recipients can claim work-related expenses in excess of the maximum standards, then the reasonableness of the claimed expenses should be decided administratively in the same manner as other eligibility determinations.

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[2]Respondent SCHOUE had work-related transportation expenses in excess of the state standard, in part because she had substantial repair bills for her eleven year old car. Respondent LOEFFEL also had transportation expenses which exceeded the state standard due in part to high car insurance bills.

Petitioners also emphasize that their practice is followed by a number of other states. However, it should be noted that there are states that permit recipients verification of the actual, reasonable work-related expenses in the areas which are involved in this case.[3] For example, Minnesota allows a deduction of $0.10 per mile for work-related transportation expenses, but permits AFDC recipients to verify greater expenses. Minnesota also provides a standard deduction of $1.00 per day for lunch, but permits recipients to prove greater actual expenses. Indiana allows a standard deduction of $0.60 per day for meal expenses, but AFDC recipients may show higher actual expenses.

The District Court, in its opinion and order dated November 1, 1979, held that petitioners' policy violated 42 U.S.C. §602(a)(7) and this Court's holding in *Shea* v. *Vialpando,* 416 U.S. 251 (1974), by denying AFDC applicants and recipients an opportunity to show that they have incurred reasonable work related expenses in excess of the maximum standard deductions for transportation, meals and clothing. The District Court noted in its opinion, and respondents readily acknowledge, that petitioners may establish standards, but if they choose to do so they must allow AFDC applicants and recipients an opportunity to prove that they have reasonable expenses in excess of standardized maximums.

On April 24, 1980, the United States Court of Appeals for the Eighth Circuit issued an order affirming the judgment of the District Court based upon the opinion of the lower court.

On May 16, 1980, the Court of Appeals awarded respondents $1500.00 in attorney's fees.

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[3]Nevada, Delaware, Wisconsin, Indiana, West Virginia, Oklahoma, Massachusetts, New Jersey and Minnesota allow actual transportation expenses to be deducted. At least five states allow applicants and recipients to deduct actual meal expenses (Maryland, Minnesota, Nevada, Wisconsin and Oklahoma).

ARGUMENT

I

The Court Of Appeals Decision Correctly Interprets 42 U.S.C. §602(a)(7) And This Court's Decision In Shea v. Vialpando, 416 U.S. 251 (1974).

Petitioners argue that the decision below misinterprets 42 U.S.C. §602(a)(7) and this Court's decision in *Shea* v. *Vialpando,* 416 U.S. 251 (1974), and therefore involves an important question of federal law which has not been, but should be, settled by this Court.

Petitioners argue that their maximum deductions for different categories of work-related expenses are permissible under 42 U.S.C. §602(a)(7). This argument ignores the plain language of the federal statute which requires the deduction of *"any* expense reasonably attributable to the earning of . . . income". (Emphasis added.) The commonly accepted meaning of the term "any" leads to the conclusion that §602(a)(7) requires the deduction of *all* actual work-related expenses,[4] subject only to a requirement of reasonableness.

This interpretation of 42 U.S.C. §602(a)(7) is mandated by this Court's decision in *Shea* v. *Vialpando*. There, the Colorado welfare department provided an absolute maximum deduction of only thirty dollars ($30.00) for all work-related expenses of AFDC recipients. In concluding that this policy violated §602(a)(7), this Court made the following comments which are equally applicable to the facts of the present case:

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[4]This interpretation of the statute is also supported by the implementing regulations which require the deduction of *"all actual* expenses", 45 C.F.R. §233.20(a)(7)(i). (Emphasis added.)

> By its terms [§602(a)(7)] requires the consideration of "any" reasonable work-related expenses in determining eligibility for AFDC assistance. In light of the evolution of the statute and the normal meaning of the term "any" we read this language as a Congressional directive that no limitation apart from that of reasonableness, may be placed upon the recognition of expenses attributable to the earning of income. Accordingly, a fixed work expense allowance which does not permit deduction for expenses in excess of the standard is directly contrary to the language of the statute. *Id.* at 260.
>
> Standardized treatment of employment-related expenses without provision for demonstrating actual and reasonable expenses in excess of that standard amount, such as Colorado has adopted, threatens to defeat the goal Congress sought to achieve in adopting the mandatory work expense recognition provision of [§602(a)(7)].
>
> By limiting employment expenses to $30.00 per month, the Colorado regulation resulted in a disincentive to seek or obtain employment, for all recipients whose reasonable work-related expenses exceed or would exceed that amount. Accordingly, the Colorado regulation conflicts with federal law and is, therefore, invalid.
>
> It is, of course, not the adoption of a standardized work expense allowance per se which we hold to be violative of [§602(a)(7)] of the Act, but the fact that the standard used by Colorado is in effect a maximum or absolute limitation upon the recognition of such expense. *Id.* at 261.

The facts in *Shea* differ from the facts of this case to the extent that the invalid Colorado policy did not allow itemization for categories of work-related expenses. At the time of trial, Missouri allowed a maximum deduction of $0.15 per mile for transportation, $0.60 per meal for lunch, and no deduction for

clothing other than such items as uniforms or special shoes. However, the effect of the maximum deductions allowed for work-related transportation, clothing and lunch expenses in the present case is identical to the effect of the invalid Colorado regulation. In both cases, a maximum standard deduction prevented individual AFDC applicants and recipients from receiving deductions for higher actual expenses. Since the effect is the same in both situations, the holding in *Shea* applies with equal force to the facts of this case,[5] *Perez* v. *Chang*, 438 F. Supp. 238 (D. Haw., 1977); *Fones* v. *Percy*, No. 78-C-191 (W.D. Wisc., December 7, 1978), *aff'd* 601 F2d 600 (7th Cir. 1979). (A copy of the *Fones* decision is included as Appendix 1 to this Brief.)

Accordingly, the Court of Appeals correctly held that the reasoning of *Shea* applies here and prohibits maximum deductions for the work-related transportation, clothing and meal expense of AFDC applicants and recipients.

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[5]Amici Curae contend that the legislative history of section 602(a)(7) supports petitioners' position that maximum standards may be imposed. However, this Court, in *Shea*, analyzed the legislative history of the section, both before and after its passage, and concluded that maximum standards were clearly impermissible. *Shea*, 416 U.S. at 263-265. This Court also discounted as irrelevant amici curae's claim that an increased administrative burden would be borne by the states. *See, Shea*, n.13. Moreover, other states clearly permit verification of the actual, reasonable work-related expenses in the areas which are involved in this case. *See*, n. 3. If the administrative burden is as great as amici curae seem to indicate, then it is difficult to comprehend why the verification of actual expenses is voluntarily permitted in these states.

II

The Court Of Appeals' Decision Refusing To Defer To HEW's Interpretation Of 42 U.S.C. §602(a)(7) Is Not In Conflict With Prior Decisions Of This Court.

The Department of Health, Education and Welfare approved Missouri's policy of establishing maximum deductions for the work-related transportation, meal and clothing expense of AFDC applicants and recipients. Petitioners contend that the Court of Appeals failure to give deference to HEW's position is in conflict with applicable decisions of this court, *Southwestern Sugar and Molasses Co.* v. *River Terminals Corporation,* 360 U.S. 411 (1959); *Far East Conference* v. *United States of America,* 342 U.S. 570 (1952); *Rosado* v. *Wyman,* 397 U.S. 397 (1970); *Mathews* v. *Eldridge,* 424 U.S. 319 (1976); and *Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Commission,* 390 U.S. 261 (1968). A fair reading of these cases shows no conflict between these decisions and the decision by the Court of Appeals. They merely require that consideration be given to the statutory interpretation of the relevant administrative agency.

In *Shea,* the state welfare officials made the same claim regarding HEW sanctioning their practice of adopting maximum work-expense deductions as petitioners make in this case. This Court, in determining that it was not bound by HEW's position, stated:

> But the sound principle of according deference to administrative practice normally applies only where the relevant statutory language is unclear or susceptible of differing interpretations . . . In view of the literal requirements of [§602(a)(7)], which accord with the federal policy underlying its enactment, we need not look to agency practice in this case. Moreover, HEW itself has not adhered to a uniform practice. Although in recent years, HEW has construed [§602(a)(7)] to permit standardiza-

> tion of some items, in 1964 it required that "items of work expenses must be allowed when there is a determination that such expenses do, in fact, exist in the individual case". HEW Handbook of Public Assistance Administration, Part IV, #1340 (1967).
>
> *Shea,* 416 U.S. at 262-263, n. 11.

The instant case presents a situation identical to that in *Shea.* The applicable statute, 42 U.S.C. §602(a)(7), requires the deduction of *"any* expenses reasonably attributable to the earning of . . . income". (Emphasis added.) This language is clear and susceptible of only one interpretation. In addition, some states such as Minnesota and Indiana have been permitted to treat work-related transportation and meal expense in a manner inconsistent with HEW's alleged policy. Since these states' AFDC plans were also approved by HEW, it is clear that HEW has not followed a uniform practice with respect to the situation presented here. Under these circumstances, the Court of Appeals' decision not to defer to HEW's statutory interpretation was proper and is not in conflict with prior decisions of this Court.

III

The Award of Attorney's Fees By The Eighth Circuit Court of Appeals Is Not Erroneous And Neither Conflicts With Prior Decisions Of This Court Nor With Prior Decisions Of Other Circuit Courts Of Appeals.

Petitioners argue that the Attorney's Fees Awards Act of 1976 (Act), 42 U.S.C. §1988, confers authority only upon district courts to award attorney's fees. However, this Court has previously found that federal courts of appeals do have authority under the Act to award attorney's fees for services performed in the appellate courts. *Hutto* v. *Finney,* 437 U.S. 678 (1980). Those Courts of Appeals which have addressed this issue have also determined that they had authority to award attorney's fees under the Act. *Vasquez* v. *Fleming,* 617 F2d 334 (3rd Cir. 1980);

Green v. *Ten Eyck*, 572 F2d 1233 (8th Cir. 1978); *Davis* v. *Murphy*, 587 F2d 362 (7th Cir. 1978).

IV.

The Award Of Attorney's Fees To Legal Services Attorneys By The Eighth Circuit Court Of Appeals Is Not Erroneous And Does Not Conflict With Prior Decisions Of Other Circuit Courts Of Appeals.

Petitioners contend that the purpose of the Act is not satisfied by an award of attorneys' fees to legal services lawyers. The Court in *Rodriquez* v. *Taylor*, 569 F2d 1231 (3rd Cir. 1977), *cert. den.* 436 U.S. 913 (1978) (attorney's fees issue raised in Petition for Writ of Certiorari, 46 U.S.L.W. 3706) found that legal services attorneys were entitled to receive a fee for their services under the Act and noted:

> The award of fees to legal aid offices and other groups furnishing *pro bono publico* representation promotes the enforcement of the underlying statutes as much as an award to privately retained counsel. Legal services organizations often must ration their limited financial and manpower resources. Allowing them to recover fees enforces their capability to assist in the enforcement of congressionally favored individual rights.
>
> 569 F2d at 1245.

Accord, *Oldham* v. *Ehrlich*, 617 F2d 163 (8th Cir. 1980). *See Brown* v. *Stanton*, 617 F2d 1224 (7th Cir. 1980); *Dennis* v. *Chang*, 611 F2d 1302 (9th Cir. 1980); *Bonnes* v. *Long*, 599 F2d 1316 (4th Cir. 1979); *Lund* v. *Affleck*, 587 F2d 75 (1st Cir. 1978); *Holly* v. *Levine*, 605 F2d 638 (2d Cir. 1979); *Mid Hudson Legal Services, Inc.* v. *G + U, Inc.*, 578 F2d 34 (2d Cir. 1978); *Gore* v. *Turner*, 563 F2d 159 (5th Cir. 1977); *See also*, *Hairston* v. *R & R Apartments*, 510 F2d 1090 (7th Cir. 1975); *Incarcerated Men of Allen County Jail* v. *Fair*, 507 F2d 281 (6th Cir. 1974); *Brandenberger* v. *Thompson*, 494 F2d 885 (9th Cir. 1974).

The cases cited by petitioners are inapposite.[6] In *Hoitt* the court noted that legal services corporations could be awarded attorney's fees, 495 F2d at 221, but because of the particular circumstances of that case upheld the denial of fees as within the ambit of the district court's discretion. *Gaddis* and *Woolfolk* antedated the Act and both the Second Circuit Court of Appeals and the Fourth Circuit Court of Appeals now allow attorney's fees to be awarded legal services organizations under the Act.[7]

V

The Award Of Attorney's Fees Pursuant To The Attorney's Fees Awards Act Of 1976, 42 U.S.C. §1988, In A Case Where A State Regulation Is Found To Be Inconsistent With The Social Security Act And A Substantial Constitutional Question Is Alleged Is Not Erroneous And Is Not In Conflict With Decisions Of This Court Or Other Courts Of Appeals.

The Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988, authorizes an award of fees to the prevailing party in actions brought pursuant to 42 U.S.C. §1983. Petitioners contend that Respondents are not entitled to an award under the Act because this case was decided on the pendent statutory claim and respondents' constitutional claim under §1983 was frivolous.

This Court recently held that civil rights litigants who have alleged a substantial constitutional claim under section 1983 are entitled to an award of attorney's fees under the Act, even

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[6] *Hoitt* v. *Vitek*, 495 F2d 219 (1st Cir. 1974); *Gaddis* v. *Wyman*, 336 F. Supp. 1225 (S.D. N.Y. 1972); *Woolfolk* v. *Brown*, 358 F. Supp. 524 (E.D. Va. 1973).

[7] *See, Mid Hudson Legal Services, Inc.* v. *G + U., Inc.*, 578 F2d 34 (2d Cir. 1978) and *Bonnes* v. *Long*, 599 F2d 1316 (4th Cir. 1979), respectively.

though relief is granted solely upon a pendent statutory claim, *Maher* v. *Gagne,* No. 78-1888 (U.S. Supreme Court, decided June 25, 1980); *See, Kimbrough* v. *Arkansas Activities Association,* 574 F2d 423 (8th Cir. 1978); *Lund* v. *Affleck,* 587 F2d 75 (1st Cir. 1975); *Bonds* v. *Stanton,* 555 F2d 172 (7th Cir. 1977), *cert. den.* 438 U.S. 916 (1978); *Seals* v. *Quarterly Country Club,* 562 F2d 390 (6th Cir. 1977). The issue presented is, therefore, whether respondents have alleged a substantial constitutional claim under §1983. If they have alleged a substantial constitutional claim, then they are entitled to an award of attorney's fees under the Act.

Respondents' civil rights action under §1983 alleged[4] that petitioners' policy violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment. The test for determining whether respondents have stated a substantial constitutional question is set forth in *Hagans* v. *Lavine,* 415 U.S. 528 (1974). In *Hagans,* this Court held that a constitutional claim is substantial unless it is obviously frivolous or inescapably foreclosed by prior decisions.

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[4] Respondents Complaint alleges the following Constitutional claims:

First Claim For Relief

> By illegally failing to deduct from plaintiffs' gross income any and all actual work-related expenses prior to determining need and the amount of the AFDC assistance grant, defendants have created two classes of AFDC applicants and recipients in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. One class, which consists of those AFDC applicants and recipients who are employed, but whose work-related expenses do not exceed the maximum deductions permitted by defendants, have their need and the amount of the assistance grants determined on the basis of their available resources. The second class, composed of AFDC applicants and recipients who are employed and whose work-related expenses exceed the maximum deductions permitted by defendants, do not have their need and the amount of their assistance grants determined on the basis of their available

In *Gagne* v. *Maher,* 594 F2d 336, 341 (2d Cir. 1979), the Court of Appeals for the Second Circuit was asked to decide whether the following claim stated a substantial constitutional question:

> Whether an impermissible distinction had been created between those working welfare recipients whose work-related expenses were fully considered in the computation of AFDC awards and those whose work-related expenses were not fully considered in violation of the equal protection clause.

The Second Circuit held that this claim stated a substantial constitutional question under the *Hagans* v. *Lavin* test. This is precisely the same equal protection claim which is raised by respondents, *See* n. 8.

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resources because all work-related expenses are not deducted from their gross income prior to determining need and the amount of their assistance grants.

This classification is arbitrary and irrational and contrary to the purposes of the AFDC program, one of which is to provide a work incentive for applicants and recipients by deducting work-related expenses prior to determining need and the amount of their assistance grants and thus is invalid under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Second Claim For Relief

The Social Security Act, 42 U.S.C. §602(a)(7) and implementing regulation, 45 C.F.R. §233.20, establish plaintiffs' property rights to assistance grants which are determined by deducting from plaintiffs' gross income any and all actual work-related expenses prior to determining need and the amount of their assistance grants. By illegally failing to deduct from plaintiffs' gross income any and all actual work-related expenses, defendants have violated and are violating substantive due process rights secured by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Since their constitutional claims are neither frivolous nor inescapably foreclosed by prior decisions, respondents have stated a substantial constitutional claim, *Hagans, supra.* They are accordingly entitled to an award of attorney's fees based upon their pendent statutory claim.[9]

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

MICHAEL L. LYONS
Legal Services of Eastern Missouri, Inc.
216 North Third Street
St. Charles, Missouri 63301
(314) 946-2221

RICHARD CHASE
Legal Services of Eastern Missouri, Inc.
3684 Lindell Boulevard
St. Louis, Missouri 63108
(314) 534-8810
Attorneys for Respondents

July, 1980

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[9] In addition, this Court has recently held that violations of the Social Security Act may be remedial under the "and laws" language of section 1983, and therefore respondents' action is expressly covered by section 1988. *Maine* v. *Thiboutot,* No. 79-838 (U.S. Supreme Court, decided June 25, 1980).

APPENDIX

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

THELMA FONES, on behalf of herself and all other persons similarly situated,

Plaintiffs,

vs.

DONALD E. PERCY, individually and in his capacity as Secretary of the Wisconsin Department of Health and Social Services; BERNARD STUMBRAS, individually and in his capacity as Administrator of the Division of Economic Assistance of the Wisconsin Department of Health and Social Services; and THEIR AGENTS, EMPLOYEES, SUCCESSORS IN OFFICE, ASSISTENTS AND ALL OTHERS ACTING IN CONCERT OR COOPERATION WITH THEM OR AT THEIR DIRECTION OR UNDER THEIR CONTROL,

Defendants.

OPINION AND ORDER
78-C-191

Plaintiffs have moved for summary judgment. Jurisdiction is present as to the subject matter and the parties.

I find that there is no genuine issue as to any of the material facts set forth in the stipulation filed September 15, 1978, and the addendum thereto filed October 13, 1978.

The motion turns on the proper reading of *Shea* v. *Vialpando,* 416 U.S. 251 (1974).

Defendants' contention is that a standard allowance of 17 cents per mile is reasonable, that is, reasonably high. More particularly, counsel assert that 17 cents per mile is the same allowance that the state uses in reimbursing its employees for the use of their personal automobiles for purposes of state business. I do not find this proposition among the stipulated facts, but I will assume its truth. The argument seems to be that if this is a permissible generalized practice for one purpose, it is also lawful for the purpose at issue in the present case.

I have no basis for deciding whether the 17 cents per mile allowance is lawful for the use of the automobiles of state employees for public business. Conceivably, it is unlawful. But that matter is not governed by Section 402(a)(7) of the Social Security Act, as construed in *Shea,* as is the issue in this case.

It is true that the manner in which Colorado had limited employment expenses in *Shea* differed from the manner in which Wisconsin proposes to act, and it may well be that at the time the Colorado method had more severe consequences for more recipients than would the proposed Wisconsin method presently. But, as defendants' counsel appears to concede, in *Shea* the Court was explicit that recipients must be given the opportunity to show that their actual expenses exceed the standard amount. Defendants' counsel considers it critical that in *Shea* the court applied the adjective "reasonable" to the words "actual expenses" in this context. I appreciate that when a recipient is given the opportunity to show that the recipient's actual expenses exceed the standard allowance and does make such a showing, there remains to be determined whether the excess of actual expenditure is "reasonably attributable to the earning of" income. However, I do not understand why the recipient may be deprived of the opportunity to take step one (the showing that actual expenses exceed the standard allowance) simply because in a given case the recipient may or may not succeed in taking step two (the showing that the excess of actual expenditure is reasonably attributable to the earning of income).

I realize that if in 1978, a state imposed a flat limit of a dollar per mile, for example, it might well become academic whether one is afforded the opportunity to show that the limit has been exceeded by one's actual expenses reasonably attributable to the earning of income. Even in such circumstances, the opportunity probably could not simply be denied, under *Shea*. But defendants do not contend, nor on the record made in this case could they successfully contend, that the 17 cents per mile limit renders the opportunity academic.

In their brief in support of their motion for summary judgment, plaintiffs have offered some observations about difficulties inhering in some of the precise terms of the preliminary injunction, and plaintiffs have submitted a proposed permanent injunction in a form intended to eliminate those difficulties. From the silence of defendants' counsel on these points, I infer that assuming an injunction is to be granted over their opposition, defendants have no objection to the form proposed by plaintiffs. However, I have made certain minor modifications in the proposed order.

Order

1. It is hereby ordered that plaintiffs' motion for summary judgment is granted.

2. It is ordered that judgment be entered declaring that the Social Security Act, 42 U.S.C. §602(a)(7), is violated by defendants' policy of failing to deduct from the earned income of AFDC recipients whose cars are necessary for employment actual transportation costs reasonably attributable to the earning of income which are in excess of either (a) 17 cents per mile or (b) the allowance computed according to the May, 1978 policy.

3. It is further ordered that defendants Donald E. Percy and Bernard Stumbras and their agents, employees, successors in office, assistants and all others acting in concert or cooperation with them or at their discretion or under their control shall be

permanently enjoined from failing to deduct from the earned income of AFDC recipients whose cars are essential for employment the following costs: the purchase price of a car or the monthly payments for a loan for the purchase of a car, subject to a reasonable limitation on the purchase price which is no less than Fifteen Hundred Dollars ($1,500.00); collision and liability insurance in reasonable amounts; total car registration fees; total parking fees and tolls required for employment; gas and oil used for driving necessary for employment; and the cost of repairs and maintenance reasonably attributable to the earning of income.

4. It is further ordered that within thirty (30) days of the entry of this order, defendant Donald E. Percy or his successor in office shall send a notice to the director of each county welfare agency in the State of Wisconsin containing the following information (a copy of this notice shall be provided to counsel for the plaintiffs at the same time):

(a) the requirements contained in paragraph 2 and 3 of this order and a statement that it is binding upon the directors and upon all employees of their respective agencies;

(b) the prospective relief available to recipients as a result of this order and the documentation recipients must present to the county agency to obtain prospective benefits;

(c) a statement whether retroactive benefits shall be available to members of the class and, if retroactive benefits are available, the administrative mechanism and time limitations which shall govern the recovery of those benefits;

(d) a statement that within sixty (60) days of the entry of this order a written notice containing the information in

(b) and (c) shall be sent by the director of each county welfare agency to all AFDC recipients in that county who are working or have worked since July 1, 1977.

5. It is further ordered that within one hundred twenty (120) days from the entry of this order, defendant Donald E. Percy or his successor in office shall file an affidavit with the court, with a copy to counsel for plaintiffs, containing a detailed statement of the steps taken to implement and assure the compliance of county agencies with this order.

Entered this 7th day of December, 1978.

BY THE COURT:

(James E. Doyle)
District Judge